

**SUBMISSION OF THE EUROPEAN COMMISSION TO
THE OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE
ON THE PUBLIC HEARING REGARDING
THE 2022 SPECIAL 301 REVIEW**

The European Commission welcomes the possibility to submit a contribution following the request for Comments and Notice of a Public Hearing regarding the 2022 Special 301 Review that was launched by the Office of the United States Trade Representative on 13 December 2021.

This contribution aims at clarifying the main aspects of the European Union's policy on Geographical Indications also within the framework of the international IPR/TRIPS Agreement rules, that has been the subject of specific observations in the 2021 Special 301 Report that was released on 30 April 2021.

EU GI POLICY

FOR AGRICULTURAL PRODUCTS, FOODSTUFFS, WINES, AROMATISED WINES AND SPIRIT DRINKS

MAIN ASPECTS/HISTORY

The link between a product, and a territory and its people, has always been an important part of national identity. Even in the literature of ancient times, we find references to traditional methods of producing and consuming local specialties. By the middle ages, producers/artisans were already taking advantage of the commercial attractiveness of local specialties. In order to indicate the geographical origin of the product, they created a “brand” by means of guild marks – a sign –, which certified the origin and quality of their products. To oversee the practice of their craft in a particular town, some of the producers, through internal regulations, determined the use of these signs and, consequently, controlled the manufacture of the products. Faced with globalisation and mass production in the 20th century in particular, local producers and food markets have had to adapt in order to preserve their national heritage and prevent the usurpation of their products’ names and reputations.

Well before 1992 when the first comprehensive EU legislative framework was adopted, some Member States of the then European Community established their own rules to encourage and protect the names of specific foodstuffs, wines and spirits.

Inspired by existing national systems such as the French AOC (*Appellation d’Origine Contrôlée*) dating back to the beginning of the 20th century and the Italian DOC (*Denominazione d’Origine Controllata*) systems, in 1992, the EU first introduced a system to protect and promote traditional and regional food products, to support the efforts of thousands of local producers and to offer guarantees to consumers. GIs and quality policy became a success story of the Common Agricultural Policy.

The European legislation established an intellectual property tool – a *sui generis* system of “geographical indications” (GIs) to protect the rights of producers, producer’s group and farmers, and therefore to preserve local knowledge and the methods and skills associated with traditional production. The aim of the legislation was to provide for the producers a major contribution to their living as well as to preserve cultural and gastronomic heritage. Products having a strong tie with a single region were provided a quality guarantee. According to the rules, only products specifically linked to the traditions of these areas, and compliant with the corresponding specifications, can claim GI name protection. Purchase of a quality labelled product guarantees both quality and authenticity for consumers.

Geographical indications

- Collective IPR rights
- protection is for a name, which identifies a product originating in a specific place, region or, in exceptional cases, a country
- GIs identify a good as originating from a particular place
- all the GI holders/producers/operators who comply with the product specifications may use the name
- registration in the EU free of charge
- protection unlimited in time
- direct (*ex officio*), administrative enforcement by the competent authorities
- clear rules on protection against any misuse, imitation or evocation and any other practice liable to mislead the consumer
- GI cannot be assigned or licensed to someone outside the place of origin or not belonging to the group of authorized producers

Trademarks

- in principle individual rights
- a word or a combination of words, letters, symbols, three-dimensional features such as the shape and packaging of goods, non-visible signs such as sounds or fragrances, or colour shade can constitute a trademark
- a trademark is a sign capable of distinguishing the goods or services of one enterprise from those of other enterprise
- gives its owner the right to exclude others from using that trademark
- registration fees
- limited in time, but it may be renewed
- trademark protection must be enforced by the registered owners of the mark at their own expense
- trademark can be assigned or licensed to anyone, anywhere in the world, because it is linked to a specific company and not to a particular place

GI status gives consumers a guarantee of authenticity, quality and distinctiveness linked to origin, while protecting producers from competitors trying to exploit their reputation and know-how developed to produce original high-quality products.

GI PROTECTION AT INTERNATIONAL LEVEL

At international level, GIs have been recognised as an intellectual property right since the Paris Convention for the Protection of Industrial Property, adopted in 1883. Their protection was consolidated under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) together with other IP rights such as trademarks, designs,

patents, etc.¹ The TRIPs Agreement requires WTO Members to provide the legal means of protection of GIs for all kinds of goods, and additional protection for wine and spirits GIs².

TRIPs while providing a general framework for GI recognition and protection, which is then transposed in the WTO Members' legal systems, also invites its members to conduct negotiations and conclude bilateral or multilateral agreements (whether international [trade] agreements including GI provisions or standalone GI agreements) and recognise each other's respective terms. During the past 20 years, the EU protected through international agreements with third countries more than 1600 foreign GIs in the EU.

TRIPs obligations do not require establishing a *sui generis* system for GI protection. There are two main approaches for protecting GIs at the national level: (a) the public law approach applies to cases whereby public authorities enact legislation dedicated to the specific protection of GIs (a *sui generis* system) and (b) the private law approach is the use of laws against unfair competition, trademark law (such as collective or certification marks), where the protection is primarily based on private actions. These approaches differ with respect to the conditions for protection or the scope of protection, but they share some common features in that both establish rights for collective use by those who comply with defined standards.

Another legal instrument to protect GIs internationally, administered by one of the UN agencies, the World Intellectual Property Organisation (WIPO), is the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, signed on 18 October 1958. This agreement provides – similarly to the Madrid system for trademarks or the Hague system for design – an international mechanism to protect appellations of origin through a single registration. It was recently modernised and streamlined by the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications (2015), which entered into force on 26 February 2020. The Lisbon Agreement and the Geneva Act constitute together the “Lisbon System” for the international registration and protection of appellations of origin and geographical indications. To date, the Lisbon System covers 56 countries. The Geneva Act was adopted at a WIPO Diplomatic Conference in May 2015 in complete transparency and in full compliance with international law. It preserves the principles and objectives of the Lisbon Agreement and is in line with the WTO/TRIPs Agreement [and the EU GI legislation]. All geographical indications of its members can get rapid, high-level and indefinite protection in other members. Each Contracting Party of the Geneva Act is free to choose the form of protection of geographical indications, e.g. through *sui generis* legislation, certification or collective trade marks. Therefore, there is adequate scope for accommodating the needs of countries that have not opted for a *sui generis*

¹ According to its Article 22.1 of TRIPs, “[G]eographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.”

² The TRIPs Agreement leaves it to the Members to determine the legal form for the protection of geographical indications (GIs). In practice various means are used, including laws on business practices (e.g. on unfair competition and consumer protection), trademark law (including through certification or collective marks), and *sui generis* systems specifically set up to protect GIs.

protection. The Geneva Act provides sufficient flexibility for Contracting Parties, notably through adequate safeguards and the continuing possibility of refusal of protection, as under the older Lisbon Agreement. Moreover, the Geneva Act subjects the protection of GIs against becoming generic to important limitations, e.g. as regards generic elements of a name or prior use.

While GI negotiations at WTO are stalled, the entry into force of the Geneva Act may facilitate such future negotiations by expanding the geographical coverage of GI protection through a single international registration. A significant novelty is that the Geneva Act allows for the accession of international intergovernmental organisations such as the European Union. On 26 November 2019, the EU acceded to the Geneva Act as the fifth Contracting Party to do so, leading to its entry into force three months later.

DEFINITION OF GEOGRAPHICAL INDICATIONS

A geographical indication (GI) is an intellectual property right, like trademarks, patents or industrial designs, that provides protection of a name used for products that have a specific geographical origin and possess qualities or a reputation that are essentially due to that origin. Similarly, to other forms of intellectual property that may find application in daily life, geographical indications confer rights and obligations on their beneficiaries and are governed by rules that provide guarantees to consumers.

A key difference between GIs and other IP rights is that while trademarks, designs, patents, plant variety rights and copyright are usually applied for and owned by private entities, GIs are typically applied for and managed by producer associations/producers' group in the relevant geographical area. GI rights are collective rights.

When defining the notion of “geographical indication”, the TRIPs Agreement refers to ‘indications’ which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin. Within this context, EU rules refer to a “name”, which identifies a product³ having specific qualities. In practice, EU GIs mostly consist of the name of a city, a region, or, exceptionally, a country, combined with the common name of the product. In addition, a non-geographical name may also be protected as a GI, which is *in accordance with the provisions of TRIPs and the EU legislation*. “Feta”, for example, is a GI used for designating a white cheese originating in a delimited area in Greece. While the GI in question does not include or refer to the name of any place, region, or

³ In certain countries, graphical representations of places, symbols and emblems are accepted as geographical indications: for example, the image of a famous mountain in Switzerland, the Matterhorn, is, under Swiss law, an “indirect geographical indication”, which identifies that a product comes from Switzerland, in: *A Handbook on the WTO TRIPS Agreement*, edited by Antony Taubman, Hannu Wager, and Jayashree Watal, Cambridge University Press (2012), p. 79.

country, it has been registered as a GI⁴ because the name “Feta” was deemed sufficient to identify such cheese as originating in a specific area of Greece.

BENEFIT OF GI PROTECTION

More than 5100 GIs are protected in the EU, either via GI applications submitted directly by EU/third country’s applicants/producers or producers’ group, or via international agreements concluded between the EU and third countries. Famous examples of European GIs include “Bordeaux”, “Champagne”, “Porto”, “Parmigiano Reggiano”, “Prosciutto di Parma”, “Tiroler Speck”, “Tokaj”, “Queso Manchego” or “Bayerisches Bier”.

Third country GIs that are protected in the EU include products such as “Café de Colombia”, “Napa”, “Sonoma”, “Willamette Valley”, “Bourbon Whiskey” (USA), “Tequila” (Mexico), “Vino Asoleado” (Chile), “Stellenbosch” (South Africa), “Banano de Costa Rica” (Costa Rica), “고려홍삼 (Korean Red Ginseng)” (South Korea), “Gruyère” (Switzerland), “თელისანი (Teliani)” (Georgia), etc.

Quality symbols, such as those referring to geographical indications⁵ are an excellent instrument to recognise a product with intrinsic value in the marketplace. A clear advantage of geographical indications is that the right to use a product name is granted only to the producers who meet the requirements of the specification and produce or operate within the demarcated area. Consumers can trust the authenticity of a product that is marketed with a quality symbol⁶.

Comparative analysis between the prices of GI products and the corresponding standard products has shown that in most cases GI products achieve a price premium over the latter. A recent study commissioned by DG AGRI on the value of GIs shows that, the sales value of GI products was on average (weighted) 2.07 times higher than the sales value for comparable standard products without a GI label.⁷

⁴ See Judgment of 25 October 2005, Germany and Denmark v. Commission, joined cases C-465/02 and C-466/02 (EU:C:2005:636).

⁵ All those names which are protected as a PGI or a PDO in the EU can be recognised on the market by “red”/“yellow” and “blue”/“yellow” logos,⁵ which enclose the EU stars. The so-called “quality logos” attest to the specific traditions, characteristics, and quality of food, agricultural products, and wines, aromatised wines, and spirit drinks, produced in the European Union or in other countries. Food and wine products are eligible for the PDO and PGI logos, while spirit drinks and aromatised wines qualify for PGI recognition. Logos can be downloaded from https://ec.europa.eu/info/food-farming-fisheries/food-safety-and-quality/certification/quality-labels/quality-schemes-explained_en#logos. The logos benefit from trademark protection in many countries around the world.

⁶ Obligatory in the EU for foodstuff and voluntary for wines and spirits.

⁷ https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/evaluation-policy-measures/products-and-markets/eco-values-gis-tsg_en

Geographical indications also make a valuable contribution to sustainable⁸ rural development as they reflect by definition a strong association between a product and its territorial origin. The regional economic development benefits of the scheme are in many cases the greatest in regions with few, if any, alternatives to the production of the GI. Typically, such regions are more remote and often suffer from a lack of economic development opportunities, like mountain areas.

Informed consumers, whose number is growing (as are the means to source quality products e.g. via online marketing and distribution) are not only interested in buying traditionally produced goods, they also pay more and more attention to the way products are produced. That is why environmental criteria contributing for example to biodiversity and clean water, and sustainability criteria such as animal welfare may also be integrated in a GI production specification. Indeed, the producer groups are the ones who are preparing the product specifications and amending them, and can include in them additional environmental and sustainability requirements for the production on their geographical indications, and so help to preserve their products' reputation. In this way, they could also increase sales, as additional sustainability requirements appeal to certain groups of consumers.

GI schemes also create spill over effects into adjacent economic activities in the region. The marketing of the region through one GI product can bring publicity to the region and reinforce its identity, fostering *agri*-tourism (see the increasing success of gastronomy events, wine routes etc...), creating more job opportunities and increasing incomes through an indirect link with the original GI.

GIs can also be drivers for rural transformation leading to more sustainable development and positive environmental and social impacts.

GIs protect local value at global level – the only form of IPR associated with protecting the typically weaker players in the market against forces of globalisation and industrial scale production. They are not only a tool to protect EU culinary heritage but are widely used across the world.

The aforementioned study on the value of GIs has estimated their sales value at € 74.8 billion in 2017 for all types of categories (agricultural products, wines, aromatised wines and spirits). This represents close to 7 % of the whole EU agri-food and drink sector. Exports to extra-EU markets from the Member State of production were estimated at close to € 17 billion, which represented almost 23% of GI sales value and 15.5% of all extra-EU exports for food and beverages in 2017. Such data confirm the value of GIs as a share of our agri-food export basket.

⁸ See Strengthening Sustainable Food Systems Through Geographical Indications. An Analysis of Economic Impacts (2018, FAO) <http://www.fao.org/policy-support/resources/resources-details/en/c/1175499/>

PROTECTION IN THIRD COUNTRIES THROUGH TRADE AGREEMENTS

Trade agreements with third countries offer another possibility to protect EU GIs in third countries giving quality products with strong export potential an improved introduction into international markets or the possibility to expand their businesses for those that are already present on the market. This is also expressly indicated in Article 24 TRIPS providing the framework for members for negotiating a reinforcement of the protection of Geographical Indications.

In most countries in the world, by virtue of the TRIPs Agreement, legitimate EU GI holders can obtain a certain level of protection for their products. TRIPs establishes a distinction between GIs for wine and spirits, which benefit from higher level/enhanced level of protection, and foodstuffs, for which the use of non-originating product bearing the GI term is allowed when accompanied by e.g. “kind”, “like”, “type”, “style”. This creates an unjustified difference between alcoholic beverages and foodstuffs by giving lower protection level for the latter. The EU GI system provides the same high-level protection for agricultural products and foodstuffs, wines and spirit drinks.

Trade agreements concluded by the EU having a GI chapter or GI stand-alone agreement complement and build upon TRIPs Agreement, going beyond current rules of the TRIPs aiming at ensuring an adequate and effective high level of protection and enforcement of geographical indications (GI) rights. They also improve the effectiveness of enforcement of IPR, including in the digital environment and at the border (including on exports).

The agreements negotiated by the EU provide protection and effective recognition through the agreement of a list of GIs (wines, spirits, agricultural products and foodstuffs), at a high level of protection building upon Article 23 of TRIPs, i.e. the provision applicable to wine and spirits, including against evocation, as well as enhanced enforcement (including administrative/ex officio), co-existence with “bona fide” prior trademarks, protection against subsequent genericness, and provisions on adding new GIs. The list of GIs for which the Parties of the Agreement propose a protection in the other party must already be registered as a GIs in the territory of the requesting Party and they have to follow the specific public procedures foreseen in the other party, such as the publication for opposition.

Issues concerning individual prior rights, for example related to plant varieties, trademarks, generic or other legitimate prior uses, in line with WTO/TRIPS obligations, need to be addressed with the aim of finding solutions to existing conflicts in a satisfactory manner.

All GIs listed in the agreements should be effectively protected as of the date of entry into force of the agreements. The lists are “open lists”, which allows for the addition of new GI names once the agreement has taken effect.

GEOGRAPHICAL INDICATIONS AND GENERIC TERMS

WTO rules do not require that each WTO Member establishes a list of terms that are considered common or generic in its respective territory. The (only) provision related to common terms as under Article 24 (6) requires that Members are not obliged to protect a geographical indication of another Member under their national legal system protection,

where it has become a common name for describing the product in question in their territory. Accordingly, the EU legislation provided that ‘generic terms shall not be registered as protected designation of origin or protected geographical indication’. The application for registration of a geographical registration in the EU is subject to an opposition procedure, in which the generic nature of the name can be alleged as an argument against protection. Thus the genericness of a name or part of name is addressed on case-by-case assessment.

The identification of a 'generic term' depends on the de facto use in any particular territory. Labelling rules and intellectual property rights are territorial, meaning they only apply in the relevant territory.

Generic status is not a form of intellectual property right: there is no explicit right to use a generic term meaning there is a general freedom to use a generic term, as no other operator is able to protect it either as a trademark or as a GI. As generic determination, in a territory concerned, is a question of de facto use, in case of a changing reality and in particular shifting consumer appreciation, the generic status of a name can weaken.

CONCLUSIONS

This submission presents the policy of the European Union on Geographical Indications which aims at protecting the legitimate interest on the one side of producers that are working on goods of high quality and produced according to the tradition and strict criteria and which have gained market relevance, and on the other side of consumers who, when purchasing a certain good, expect to acquire a product legitimate and guaranteed.

This objective is pursued in full compliance with the international legal framework on Intellectual Property/TRIPS Agreement, both with regard to the implementation of this policy within the European Union and within the framework of its relations and bilateral agreements with third countries.

REFERENCES

EU Quality Policy

https://ec.europa.eu/info/food-farming-fisheries/food-safety-and-quality/certification/quality-labels_en

EU Legislation

https://ec.europa.eu/info/food-farming-fisheries/food-safety-and-quality/certification/quality-labels/quality-schemes-explained_en#geographicalindications

EU GI Registries

eAmbrosia (foodstuffs, wines and spirits): https://ec.europa.eu/info/e-ambrosia-database_en

GIview

<https://www.tmdn.org/giview/>